Supreme Court, U.S.
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NO. _____

IN THE UNITED STATES SUPREME COURT

OCTOBER 1992 TERM

ROBERT L. CASH, EVELYN L. CASH AND RANDALL C. BLOCK,

Petitioners

VS.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I

WHETHER THE GOVERNMENT'S FAILURE TO GIVE PETITIONERS FULL CREDIT FOR INTANGIBLE PROPERTY SEIZED VIOLATES THE TAKINGS CLAUSE OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION

II

WHETHER THE COURT OF APPEALS ERRED IN FAILING TO REVERSE THE JUDGMENT OF THE DISTRICT COURT AND RENDER JUDGMENT FOR PETITIONERS

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Reference To Reports

Cash v. United States, 961 F.2d 562 (5th Cir. 1992).

Jurisdictional Grounds

The date of the entry of the judgment sought to be reviewed is June 1, 1992. There are no orders respecting rehearing or extensions of time within which to file a Petition for Writ of Certiorari.

Statutory Authority

Jurisdiction is conferred on this Court to review the decision of the Court of Appeals by 28 U.S.C. Sec. 1254(1) by application for writ of certiorari in a civil case after rendition of the judgment.

Constitutional Provisions, Statutes and Regulations Involved in this Case

United States Constitution, Fifth Amendment: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment

or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; *nor shall private property be taken for public use, without just compensation*. (Emphasis Added).

Statutes[1]

26 U.S.C. Sec. 6331
26 U.S.C. Sec. 6332
26 U.S.C. Sec. 6335
26 U.S.C. Sec. 6337
26 U.S.C. Sec. 6342
26 U.S.C. Sec. 6672

[1]The text of the following relevant statutes is set forth in the appendix.

STATEMENT OF THE CASE

Petitioners as taxpayers seek review of an adverse judgment from the United States Court of Appeals for the Fifth Circuit. They argue that the Internal Revenue Service's levy on accounts receivable of LTS Optical, Inc. (the Petitioners' corporation) satisfied the corporation's tax liability, and thereby relieved Petitioners of any liability under 26 U.S.C. 6672 (Internal Revenue Code, hereinafter "the Code").

LTS Optical, Inc. (LTS) was formed as a Texas corporation in late 1983 with headquarters in Lubbock, Texas. The Corporation operated six wholesale optical laboratories in the Southwest. EVELYN L. CASH, her husband ROBERT L. CASH, and RANDALL C. BLOCK, Petitioners herein, were the shareholders and officers of the Corporation. For

purposes of clarity, they will be collectively referred to as "Petitioners" or "the Taxpayers."

The corporation fell behind in paying over to the UNITED STATES the income and social security taxes that had been withheld from the wages of its employees, as well as its own share of social security taxes. At the time of the levy referred to hereinbelow, the total corporate liability for both trust fund and non-trust fund taxes was $154,286.24. The IRS accordingly assessed the unpaid taxes against LTS.

In July, 1986 the IRS issued notices of levy against the corporation's accounts receivable which had a face value of $200,000.00. The IRS notified LTS's account debtors to remit the amounts owed to LTS directly to the Internal Revenue Service. The IRS also seized and sold a computer belonging to

LTS. As remittances on LTS's accounts receivable were received, the IRS credited the payments to LTS's tax liability. The IRS collected only $73,039.40 from the levies which it applied to the tax deficiency. After these credits were applied and interest and statutory penalties added, approximately $84,000.00 of the corporation's withholding tax liability remained unpaid.

The IRS then assessed the unpaid balance against the Taxpayers individually pursuant to Code Sec. 6672 and seized approximately $5,700.00 in income tax refunds due to ROBERT and EVELYN CASH and credited this amount against the tax liability.

Mr. and Mrs. CASH brought this suit for refund. The Government counterclaimed for the remaining taxes due and joined RANDALL BLOCK in the

action. Taxpayers answered the counterclaim contending that the tax had been discharged as a result of the IRS's levy on LTS's accounts receivable and subsequent handling of the asset. Essentially, the Taxpayers' claim is premised upon the IRS's seizure of a corporate asset with a face value of $200,000.00, or more than enough to pay off the entire corporate liability of approximately $150,000.00.

In this regard, the Taxpayers alleged and proved at trial that the IRS seized the accounts receivable of LTS, served notices of levy on the individual account debtors, and took no other collection actions against the account debtors. The IRS then allowed the asset to go to waste. Although the IRS collected only $73,039.40 of accounts receivable with a face value of $200,000.00, no effort was made to sell

the asset at public auction, to bring suit against the defaulting account debtors, or to release the levy so as to enable the corporation to attempt to collect the accounts receivable.

Significantly, the IRS also seized the Corporation's computer and its accounts receivable data. During the discovery phase of the proceedings below, counsel propounded discovery to the government requesting all documents related to the accounts receivable of LTS. The purpose of this requested discovery was to attempt to discover which individual accounts had been paid and which accounts had been "written off" by the IRS. The government responded that the files relating to LTS could not be located and probably had been destroyed. As noted in the opinion of the Court of Appeals, the IRS collection agent involved had a number of

discussions with Petitioner Randy Block as remittances were received from the account debtors and she also sent Block "at least a partial list" of which accounts had paid and the amounts collected.

After an adverse jury verdict, the Taxpayers filed a motion for JNOV, arguing that as a result of the levy on LTS's accounts receivable, LTS's withholding tax liability (and vicariously Taxpayers' liability) should be considered discharged. The district court denied the motion and the court of appeals affirmed.

Basis of Trial Court's Jurisdiction

The district court asserted jurisdiction pursuant to 28 U.S.C. Sec. 1331 (federal question jurisdiction) as a civil case arising under the Internal Revenue laws of the United States,

specifically 26 U.S.C. Sec. 6672.

ARGUMENT

A. **Conflict with Decisions of Other United States Courts of Appeals.** The Petitioners cited to the United States Court of Appeals for the Fifth Circuit the governing law in this case: In re: Barlow's, Inc., 36 B.R. 826 (Bankr. Va. 1984), aff'd, 53 B.R. 986 (Va. 1984), *aff'd* 767 F.2d 1098 (4th Cir. 1985); U.S. v. Eiland, 223 F.2d 118 (4th Cir. 1955); and U.S. v. Pittman, 449 F.2d 623 (7th Cir. 1971). In Barlow's, the United States Bankruptcy Court for the Eastern District of Virginia, citing Pittman, held:

> Because of the IRS's exercise of dominion and control over the account receivable in that it failed to proceed with a sale, and failed to proceed to collect the account receivable when Western defaulted, Plaintiff should be granted a credit against its tax liability in the amount of the

value of the account receivable levied upon the IRS.

36 B.R. at 829. This holding was affirmed by the district court and the United States Court of Appeals for the Fourth Circuit, upon the reasoning that by failing to conduct a sale of the property pursuant to Code Sec. 6335 and by exercising complete dominion and control over the account, the IRS had precluded the Taxpayer from partially satisfying its tax liability. The Court further reasoned that because the IRS failed to establish a market price for the accounts receivable by conducting a sale pursuant to Code Sec. 6335, the Service was obligated to credit the Taxpayer with the face amount of the account receivable.

The Court of Appeals for the Fifth Circuit distinguished Barlow's on the sole basis that the "IRS did not alter the terms of the account debtor's

liability by negotiating new payment terms with the various account debtors." Assuming *arguendo* that this assertion is true, the Fifth Circuit has placed an impossible burden upon Petitioners since the IRS either destroyed or lost all of the records which the Petitioners would need to prove that the IRS altered the terms of the account debtors' liability by negotiating new payment terms without Taxpayers' consent. It also ignores the fact that the IRS's seizure and subsequent loss or destruction of accounts receivable data should constitute "dominion and control" as a matter of law.

Moreover, the argument that the IRS must alter the terms of the account debtors' liability by negotiating new payment terms with account debtors in order to demonstrate its dominion and control over the asset is internally

inconsistent. The argument implies that if the account debtor breached such an agreement with the IRS, the Taxpayer would be in a worse position if it were forced to collect the account itself due to the fact that new payment terms had been negotiated. However, under traditional notions of contract law such a breach by the account debtor presumably would entitle the holder to accelerate the indebtedness and sue for the entire balance.

More fundamentally, however, the reasoning of the Fifth Circuit ignores the legal effect of the statutory scheme in the Internal Revenue Code designed to promote the enforcement of tax levies. As noted by the bankruptcy court in Barlow's:

> When the IRS levied on the account receivable and subsequently entered into a payment agreement with Western, the law prohibited Plaintiff

> from pursuing Western for the account. I.R.C. Sec. 6332(d) (1976).[2] Additionally, upon Western's failure to surrender the property, Western became liable to the United States for the value of the property not surrendered, plus interest from the date of the levy. I.R.C. Sec. 6332(c)(1).[3]

See Barlow's, *supra*, 36 B.R. at 829. In other words, any person holding property levied upon is required to surrender possession of it to the government without further proceedings of any kind. If he does not, he becomes liable for the tax, 26 U.S.C. Sec. 6332(d), while if he does, his liability to the taxpayer is extinguished, 26 U.S.C. Sec. 6332(e), indicating that following the levy it is the property of the government. U.S. v. Pittman, 449 F.2d 623, 627 (7th Cir. 1971). Nowhere does the Code indicate any action beyond

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[2]See now IRC Sec. 6332(e).

[3]See now IRC Sec. 6332(d)(1).

the levy itself which is necessary to place title in the government to enable it to so convey it. Id.

It must be remembered that the asset involved in this case is not tangible property which can be literally taken into possession, but rather intangible indebtedness which has been levied upon with notice to the debtor so that it is for all intents and purposes assigned to the United States. Such a levy upon an indebtedness with service of notice upon the debtor has the effect of transferring to the United States the right to receive payment of the indebtedness up to the amount of the tax. U.S. v. Eiland, 223 F.2d at 120. Upon levy and notice to the Taxpayer, what was done by the United States must be construed as a virtual transfer of the asset to the United States in that it had done everything that it could do to assert dominion over

the indebtedness and by the levy and notice had made it impossible for the account debtor to secure a discharge thereof by payment to anyone other than the United States. Id., 223 F.2d at 123.

In effect, Internal Revenue Code Sec. 6332 statutorily defines dominion and control with respect to levies upon third persons in possession of property or rights to property subject to levy. The fact that the IRS, once it has levied upon accounts receivable, can negotiate new payment terms with various account debtors is not a *requirement* of dominion and control, but rather an indication that dominion and control already exists. In U.S. v. Pittman, 449 F.2d 623 (7th Cir. 1971), the Seventh Circuit held that where the United States served a notice of levy on the taxpayer in relation to one of six parcels of real estate allegedly owned by the taxpayer, and

exercised the rights of an owner to control such property by insuring the property, renting it and compelling payment of the rent to itself and no one else, such that the taxpayer *justly concluded that he had no further legal right to deal with the property,* there was an effective levy and seizure under Internal Revenue Code Sec. 6331(a) and the taxpayer was entitled to credit for the value of the property seized as of the date of the levy.

Just as in this case, the government in Pittman failed to sell the property after seizure and apply the proceeds to the tax liability pursuant to Code Secs. 6342 and 6335. The government in Pittman failed to sell the property as required by statute because of a "bureaucratic malfunction," and instead it held the property for some fifteen months and permitted it to deteriorate in value.

The government then attempted to cure its error by telling the taxpayer for the first time that it never intended to seize the property so that the property, in its now deteriorated condition, was his problem. The Court noted:

> It is clear that a valid and effective levy under Sec. 6331(a) of the Internal Revenue Code of 1954, 26 U.S.C. Sec. 6331(a) is "an absolute appropriation in law" and a seizure of the property levied upon, tantamount to a transfer of ownership . . . (citations omitted). It would seem beyond dispute that such a seizure to enforce payment of a tax would violate the Fifth Amendment to the United States Constitution unless the taxpayer were actually given credit for his tax liability for the property so seized . . . (citations omitted). Thus, if there was a valid levy, Pittman is entitled to credit on his tax liability for the seized property.
>
> It is possible to argue that mere service of a notice of levy, as occurred here, constitutes a levy and seizure of the property of the taxpayer. See U.S. v. Eiland, 223 F.2d 118 (4th Cir. 1955) . . ..

> From the above, it would not be difficult to conclude, with the Fourth Circuit, that "the service of such notice of levy results in what is virtually a transfer to the government of the property levied upon. Eiland, supra, 223 F.2d at 121. However, Eiland involved the levy upon an intangible indebtedness rather than corporeal property as here, and we would hesitate to extend its holding. Such a step is not necessary to the decision of this case. Pittman, 449 F.2d at 626, 627. (Emphasis added).

From this analysis, it is clear that the reasoning of the Seventh Circuit in Pittman applies *a fortiori* to the instant case where the property seized by the IRS is an intangible indebtedness such as accounts receivable as opposed to real property which was at issue in Pittman. *Cf.* Rose v. Commercial National Bank, 112 B.R. 12 (Bankr. E.D. Tex. 1989), which held that an IRS levy extinguished the taxpayer's interest in receivables when the levy was served prior to the bankruptcy petition date, and In re:

Professional Technical Services, Inc., 71 B.R. 946 (Bankr. E.D. Mo. 1987), holding that where the value of property seized does not exceed the amount of the tax, a taxpayer's rights in property levied upon may be properly extinguished by an IRS levy.

B. **Important Federal Policy Consideration.** The Court of Appeals for the Fifth Circuit has decided that the Internal Revenue Service may seize from Taxpayers property with a face value of $200,000.00 and yet lawfully credit the Taxpayers with only approximately $73,000.00 on their tax liability. At the same time, it specifically held that the IRS has: (1) no duty to expend any particular level of effort to collect the levied-upon accounts when it has not negotiated new terms with the account debtors; (2) no duty to conduct a sale

of the property to establish a price for its reasonable value; and (3) no duty to release the levy or inform the Taxpayers that they have abandoned collection efforts on the accounts.

Petitioners submit that this is patently unfair and amounts to a violation of their Fifth Amendment right to just compensation for property seized by the government.

Petitioners recognize the important governmental interests in the efficient and prompt administration and enforcement of the Internal Revenue Code and protection of governmental coffers. At the same time, the Fifth Amendment forbids the government to seize the property of its citizens without just compensation. This limit necessarily implies certain minimum duties on the part of the IRS with respect to property it has seized, contrary to the holding of

the Court of Appeals for the Fifth Circuit.

Insofar as the Fifth Circuit has held that "no statute or case law imposes such a requirement" to expend any particular level of effort to collect levied accounts, while holding at the same time there is no duty to sell the accounts, this case presents important if not fundamental questions of federal law which have not been, but should be, settled by this Court.

The holding of the Court of Appeals gives the IRS virtually unlimited discretion and power to seize valuable assets far exceeding the amount of the tax owed and permanently retain possession and title to such property without crediting the tax amount owed. That is in fact exactly what has occurred in the case before this Court. If a taxpayer has (1) no right to compel a

sale of seized property in order that a market value or price could be established for the property; (2) no right to compel the IRS to vigorously pursue levied upon accounts receivable so as to convert them to cash; (3) no right to pursue the account debtors on their own (see I.R.C. Sec. 6332(e)); and (4) no right to compel the IRS to release the levy, as the Fifth Circuit has held, then the abuses inflicted upon the Petitioners in this case by the IRS will continue to flourish.

The Court of Appeals' answer to this state of affairs is that if the Taxpayers were dissatisfied with the level of collection effort by the IRS and felt that the value of the asset was greater than the value being received by the IRS in the liquidation process, they were free to redeem the accounts receivable by paying the tax deficiency in full. *See*

Code Sec. 6337(a). This right means nothing to a taxpayer who has just been put out of business by the IRS because of a demonstrated inability to meet the payroll taxes of his corporation. And it does not justify the confiscatory taking of property in excess of the amount of the tax owed from an insolvent debtor who is unable to exercise his right of redemption. This is particularly true where the data relating to the seized property have been lost or destroyed by the IRS, thereby diminishing the redemption value of the assets through no fault of the taxpayer.

If the holding of the Court of Appeals that the IRS has no duty to conduct a sale of seized property is in fact correct, then there must be some minimum duty of the IRS to valuate the property seized and credit the Taxpayers' account accordingly. This duty is to

credit the Taxpayers' account for the face value of an account receivable up to the amount of the tax. In re: Barlow's, Inc., 36 B.R. 826 (Bankr. Va. 1984), *aff'd* 53 B.R. 986 (Va. 1984), *aff'd* 767 F.2d 1098 (4th Cir. 1985). In effect, where accounts receivable are involved, and no sale is had pursuant to Code Sec. 6335, Barlow's creates a presumption that the taxpayer is entitled to a credit on his tax debt, up to the amount of the tax, in the amount of the face value of the accounts receivable.

The Fifth Circuit's attempt to distinguish Pittman on the basis that "their (Petitioners') proffered evidence does not show that more vigorous efforts would have yielded additional collections" merely demonstrates the Court of Appeals' failure to recognize this presumption as well as its misreading of Pittman. The Seventh

Circuit in Pittman noted that the district court made no findings as to the seized property's value because of its conclusion that no "seizure" had occurred. It then ordered a remand to determine the value of the property at the time it should have been sold following seizure. Pittman, 449 F.2d at 628. Assuming this Court fails to apply the presumption noted above, then this case should be treated no differently.

CONCLUSION

The IRS violated the Petitioners' Fifth Amendment rights when it seized the accounts receivable of LTS in an amount exceeding the tax owed when it failed to dispose of the property by public sale or credit the Taxpayers for its face value up to the amount of the tax.

For the reasons stated above, the judgment of the Court of Appeals should

be REVERSED and judgment RENDERED in favor of Petitioners for a refund of all amounts received by the IRS in satisfaction of this judgment. Petitioners further request that the cause be REMANDED for determination of all said amounts and for determination of reasonable attorney fees. Petitioners pray for such other and further relief to which they may show themselves justly entitled.

Respectfully submitted,

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APPENDIX

OPINION OF COURT OF APPEALS

961 F.2d 562 (5th Cir 1992)

Robert L. CASH and Evelyn L. Cash, Plaintiff-Appellants,

v.

UNITED STATES of America, Defendant-Counter Plaintiff-Appellee,

v.

Randall C. BLOCK, Counter Defendant-Appellant.

No. 90-1922.

United States Court of Appeals, Fifth Circuit.

June 1, 1992.

Taxpayers who were shareholders and officers of a corporation found liable for unpaid withheld employment taxes brought refund suit. The government counterclaimed for remaining taxes due. The United States District Court for the Northern District of Texas, Samuel Ray Cummings, J., found for the government, and taxpayers appealed. The Court of Appeals, W. Eugene Davis, Circuit Judge, held that: (1) taxpayers had standing to

complain of Internal Revenue Service's failure to consider corporation's tax debt as satisfied, due to its effect on their liability as responsible parties, and (2) taxpayers were not automatically entitled to full credit against tax deficiency for face value of seized accounts receivable.

Affirmed.

1. Internal Revenue Key No. 5203

Tax provision authorizing collection of withholding taxes from persons responsible for nonpayment, which only recovered for the government the same amount the employer was required to withhold and remit, did not impose liability which was penal in nature, but simply insured that the taxes were paid. 26 U.S.C.A. Sec. 6672(a).

2. Internal Revenue Key No. 4915

Taxpayers who were liable responsible parties for corporation's

unpaid employee withholding taxes adequately alleged injury traceable to Internal Revenue Service (IRS) action to have standing to complain of IRS's failure to consider the corporation's tax debt as satisfied; failure to give corporate taxpayer sufficient credit for seized accounts receivable would result in overstatement of individual taxpayers' liability as responsible parties. 26 U.S.C.A. Secs. 3102, 3402, 6672.

3. **Internal Revenue Key No. 4915**

Officers and shareholders of corporation complaining of the Internal Revenue Service's (IRS's) failure to consider corporation's withholding tax debt to be satisfied, adequately showed that injuries suffered could be redressed by requested relief, as required for standing; taxpayers requested that their tax liability be reduced by the face value of the accounts receivable, which

would result in no remaining unpaid withholding tax, and thus IRS could not assess a withholding tax penalty against them. 26 U.S.C.A. Sec. 6672.

4. Internal Revenue Key No. 5128

Statute setting forth procedures the Internal Revenue Service (IRS) must follow when it sells property seized from taxpayers did not require the IRS to sell all property it seized, and thus taxpayer was not automatically entitled to full credit against his tax deficiency for the face value or net value of seized accounts receivable. 26 U.S.C.A. Secs. 6331, 6335(b).

5. Internal Revenue Key No. 4855

The fact that the Internal Revenue Service (IRS) levies upon and seizes records of accounts receivable from a taxpayer liable for withholding tax did not give the IRS such dominion and control over the assets that the taxpayer

was entitled to a credit for the value of receivables at the time of the levy, as a matter of law. 26 U.S.C.A. Sec. 6672(a).

6. Internal Revenue Key No. 4855

Internal Revenue Service (IRS) is not required to expend a particular level of effort to collect the levied-upon accounts when it has not negotiated new terms with the account debtor; IRS need only assure that the taxpayer is credited with the amount actually collected on the accounts.

7. Internal Revenue Key No. 4855

Taxpayers allegedly liable for corporation's unpaid withholding taxes, who were dissatisfied with Internal Revenue Service (IRS) collection efforts on corporation's accounts receivable, failed to show that more vigorous efforts would have yielded additional collections, and thus responsible parties were not entitled to reduction of

withholding tax liability; there was no showing that the IRS's alleged physical destruction of corporate records of the accounts affected the accounts' value, and responsible party taxpayers knew the identity of some of the accounts and contacted some of the account debtors after the levy to urge them to pay. 26 U.S.C.A. Sec. 6672.

8. Internal Revenue Key No. 4855

Internal Revenue Service was not obligated to release the levy on corporate taxpayer's accounts receivable as long as the taxes remained unpaid, notwithstanding claims that IRS had abandoned collection of some of the accounts receivable; there was no indication that "responsible party" taxpayers requested and were denied information about IRS handling of levy, and they could have redeemed accounts receivable by paying tax deficiency. 26

U.S.C.A. Sec. 6337(a).

Appeals from the United States District Court for the Northern District of Texas.

Before DAVIS, JONES, and EMILIO M. GARZA, Circuit Judges.

W. EUGENE DAVIS, Circuit Judge.

Taxpayers appeal the district court's adverse judgment. They argue that the Internal Revenue Service's levy on accounts receivable of LTS Optical, Inc. (the taxpayers' corporation) satisfied the corporation's tax liability, and thereby relieved taxpayers of any liability under Sec. 6672 of the Internal Revenue Code. The United States challenges the taxpayers' standing to raise this claim. We affirm.

I.

LTS Optical, Inc. (LTS) was formed as a Texas corporation in late 1983 with

headquarters in Lubbock, Texas. The corporation operated six wholesale optical laboratories in the Southwest. Evelyn Cash, her husband Robert and Randall Block were the shareholders and officers of the corporation. (They are referred to collectively as "the taxpayers.")

The corporation fell behind in paying over to the United States the income and social security taxes that had been withheld from the wages of its employees, as well as its own share of social security taxes. For the fourth quarter of 1984, the first and fourth quarters of 1985 and the first and second quarters of 1986, LTS withheld employment taxes totalling $243,263.50, but paid over only $93,257.55. Accordingly, the Internal Revenue Service (IRS) assessed the unpaid taxes against LTS.

In July 1986, the IRS issued notices

of levy against the corporation's accounts receivable which had a face value of $200,000. The IRS notified LTS's debtors to remit the amounts owed to LTS directly to the Internal Revenue Service. The IRS also seized and sold a computer belonging to LTS. As remittances on LTS's accounts receivable were received, the IRS credited the payments to LTS's tax liability. The IRS collected $73,039.40 from the levies which it applied to the tax deficiency. After these credits were applied and interest and statutory penalties added, approximately $84,000 of the corporation's withholding tax liability remained unpaid. The IRS then credited approximately $5,700 in income tax refunds due Robert and Evelyn Cash against the tax liability.

The Cashes brought this suit for refund. The Government counterclaimed

for the remaining taxes due and joined Randall Block in the action. The taxpayers answered the counterclaim contending that they were not responsible persons who willfully failed to pay over the withheld taxes. In addition, the taxpayers asserted that the tax had been discharged as a result of the IRS's levy on LTS's accounts receivable and subsequent handling of the asset.

The district court granted the Government's motion in limine to exclude from trial any evidence relating to how the IRS handled the seized accounts receivable. The court concluded that this evidence did not relate to any factual issue for jury decision. It reasoned, based upon the taxpayers' proffered evidence, that the IRS' collection procedures did not as a matter of law make out taxpayers' defense that the debt was discharged.

The taxpayers offer of proof included the depositions of the IRS case agent and Randall Block. According to the deposition of the IRS agent who handled the levy, one notice of levy was sent to the account debtors. She made no other effort to collect the receivables, although her usual practice was to follow up once with a phone call or letter. The agent had a number of discussions with Block as remittances were received from the account debtors. She also sent Block at least a partial list of which accounts had paid and the amounts collected.

Randall Block testified in his deposition that when the IRS seized the company's computer, they also seized the accounts receivable data stored in the computer and the only physical copy of the accounts receivable listing. The IRS gave him no notice that the computer or records would be seized and apparently

gave him no opportunity to make a copy for himself from the computer database. The data stored in the computer's memory was erased after the seizure. After the levy, Block contacted some of his customers who owed LTS money to encourage them to pay. He met with little success.

The court presented the jury the issue of the taxpayers' responsibility and willfulness in failing to pay over the withholding taxes of LTS's employees. The jury concluded that Robert Cash and Randall Block were responsible and willful for the fourth quarter of 1984, the first and fourth quarters of 1985, and the first two quarters of 1986 (all quarters with deficiencies). The jury found Evelyn Cash responsible for all five quarters but willful only for the first two quarters of 1986.

The taxpayers filed a motion for JNOV. In their motion, the taxpayers

argued that as a result of the levy on LTS's accounts receivable, LTS's withholding tax liability should be considered discharged. Once LTS's tax liability is satisfied, taxpayers contend that their liability as responsible parties is also discharged. The district court denied their motion and the taxpayers appeal.

II.

An explanation of the statutory background is helpful to understand both the merits of this appeal as well as the taxpayers' standing to appeal. The sole question presented on appeal relates to taxpayers' liability as "responsible parties" for unpaid federal withholding taxes. Sections 3102(a) and 3402(a) of the Internal Revenue Code (26 U.S.C.) require employers to withhold federal social security and income taxes from the wages of their employees. The withheld

taxes constitute a special fund held in trust for the benefit of the United States under Sec. 7501 of the Code. *Newsome v. United States*, 431 F.2d 742, 745 (5th Cir. 1970). If an employer withholds these trust fund taxes but fails to pay them over to the United States, the employee is nevertheless credited with payment. *Slodov v. United States*, 436 U.S. 238, 243, 98 S.Ct. 1778, 1783, 56 L.Ed.2d 251 (1978); *Newsome*, 431 F.2d at 744. Thus, unless the Government has recourse against the person or persons responsible for nonpayment, the taxes will be lost. *Id.*

[1] Not surprisingly, the Internal Revenue Code contains a provision allowing collection from the persons responsible for the nonpayment. Section 6672(a) of the Code provides, in part:

> [A]ny person required to collect, truthfully account for, and pay over any tax imposed by this title who

> willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall . . . be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over.

Although denoted a penalty in the statute, the liability imposed by Sec. 6672(a) is not penal in nature because it only recovers for the government the same amount the employer was required to withhold and remit. Section 6672 simply insures that the taxes are paid. *Id.* at 745, citing *Botta v. Scanlon*, 314 F.2d 392, 393 (2d Cir. 1963). Consistent with this purpose, the IRS follows a policy of collecting the delinquent taxes only once. Therefore, if the employer corporation pays the required withholding, then any tax assessment against responsible parties will be abated to the extent of the payment.

At the same time, however, it is

well established that the liability imposed upon a responsible person under Sec. 6672 is separate and distinct from that imposed on the employer under Secs. 3102 and 3402 of the Internal Revenue Code. *United States v. Huckabee Auto Co.*, 783 F.2d 1546, 1548 (11th Cir. 1986); *Howard v. United States*, 711 F.2d 729, 733 (5th Cir. 1983); *Hornsby v. I.R.S.*, 588 F.2d 952, 954 (5th Cir. 1979). The Service need not attempt to collect first from the corporate employer or its assets before assessing penalties and pursuing collection from responsible persons under Sec. 6672. *Huckabee Auto Co.*, 783 F.2d at 1549; *Hornsby*, 588 F.2d at 954.

III.

[2] Before considering the merits of the taxpayers' appeal, we must first address whether they have standing to complain of the IRS's failure to consider

LTS's tax debt as satisfied. The Supreme Court has stated the test for standing as follows:

> [T]he standing question in its Art. III aspect "is whether the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant *his* invocation of federal court jurisdiction and to justify exercise of the court's remedial powers on his behalf." . . . In sum, when a plaintiff's standing is brought into issue the relevant inquiry is whether, assuming the justiciability of the claim, the plaintiff has shown an injury to himself that is likely to be redressed by a favorable decision.

Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 38, 96 S.Ct. 1917, 1924, 48 L.Ed.2d 450, 460 (1976) (internal citations omitted, emphasis in original).

Applying this test, the first requirement is that the plaintiff-taxpayers must have suffered an injury that can be fairly traced to the challenged action of the defendant, IRS.

Id. at 41-42, 96 S.Ct. at 1925-26. The IRS argues that the taxpayers have not been injured by the IRS's levy against the assets of LTS. This is true, IRS contends, because the taxpayers' liability as responsible persons under Sec. 6672 is separate and distinct from LTS's corporate liability under Secs. 3102 and 3402. The IRS clearly could have pursued collection of the tax from the taxpayers individually without levying on LTS's assets. In this case, however, they did not do so. Due to the structure of the tax, any sums unpaid by the corporation are assessed against the taxpayers as responsible parties for the collection and payover. If the IRS receives payments from the corporation either voluntarily or by IRS levy on corporate assets, the taxpayers' liability as responsible parties must be reduced. Thus, if the taxpayers can

establish that the IRS failed to give LTS sufficient credit for the seized accounts receivable, taxpayers' liability as responsible parties is overstated. If so, they have been injured in fact and the alleged harm can be clearly traced to the IRS's handling of the accounts receivable.

[3] The second requirement for standing is that the relief sought, if granted, must redress the injured suffered. If the taxpayers are granted their requested relief, i.e. that their tax liability be reduced by the face value of the accounts receivable, there would be no remaining unpaid withholding tax. Due to the Service's policy of only collecting the tax once, it could not assess a penalty under Sec. 6672 against the taxpayers. Thus, the taxpayers also satisfy the second requirement for standing. We therefore conclude that

taxpayers' have standing to present this argument on appeal. We now turn to the merits of their claims.

IV.

The taxpayers contest the judgment against them on the ground that the taxes assessed against them should be considered paid. First, they contend that the IRS was required to sell the levied upon accounts receivable and because it did not sell the accounts the debt should be considered discharged.[1] Second, the taxpayers complain of the IRS's handling of the levied on accounts. When the IRS levied on the accounts, the taxpayers were precluded from attempting to collect any amounts due to LTS. The

[1]The taxpayers specifically argue that a "levy" is the same as a "seizure" under the Internal Revenue Code and Regulations and that all seized property must be sold or the full value of the property credited against the tax liability of the owner of the property. As our analysis does not rest on whether the IRS levied upon or seized LTS's accounts receivable, we need not address whether the IRS levy in this case was a "seizure" under Sec. 6335(b).

taxpayers argue that even if they were allowed to make a collection effort, that possibility was foreclosed when the IRS seized and destroyed the corporate records of the accounts. Relatedly, the taxpayers complain of the IRS' collection efforts. The taxpayers contend that IRS' efforts in sending an initial notice of levy to the debtors with no follow up was inadequate. They also complain that the IRS did not release the levy or notify them when they abandoned collection of particular accounts. Taxpayers conclude that these acts combined to give the IRS dominion and control over the accounts receivable which obligated the IRS to credit the corporation's tax liability for the value of receivables.

[4] As an initial matter, we reject the taxpayers' contention that Sec. 6335(b) requires the IRS to sell all

property it seizes.[2] We read that section as merely setting forth the procedures the Service must follow when it does sell such property. Other sections of the same subchapter, "Subchapter D--Seizure of Property for Collection of Taxes," indicate that the Secretary has discretion over the decision to sell. First, Sec. 6331 states "In any case in which the Secretary may levy upon property or rights to property, he *may* seize and sell such property or rights to property (whether real or personal, tangible or intangible)." (emphasis added). Use of the word "may" in a statute is generally read to confer discretion. *See United*

[2]Section 6335(b) provides in pertinent part:

> The Secretary shall as soon as practicable after the seizure of the property give notice to the owner, in the manner prescribed in subsection (a), and shall cause a notification to be published . . .. Such notice shall specify the property to be sold, the time, place, manner, and conditions of the sale thereof. . . .

States v. Rodgers, 461 U.S. 677, 706, 103 S.Ct. 2132, 2149, 76 L.Ed.2d 236 (1983).

Second, Congress also made it clear that when the levied upon property is a debt owed to the taxpayer, such as an account receivable, the levy may be satisfied by paying over to the Government the money owed to the taxpayer. *See* Sec. 6332(a).[3] Third, Sec. 6335(f) specifically grants the Secretary the discretion not to sell seized property even when the owner of

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[3]Section 6332(a) provides in pertinent part:

> any person in possession of (*or obligated with respect to*) property or rights to property subject to levy upon which a levy has been made shall, upon demand of the Secretary, surrender such property or rights (*or discharge such obligation*) to the Secretary, . . . [Emphasis added.]

See also Sec. 6342(a) which provides in pertinent part:

> Any money realized by proceedings under this subchapter (*whether by seizure, by surrender under section 6332, . . . or by sale of seized property*) . . . shall be applied as follows . . .. [Emphasis added.]

the property requests a sale.[4] Courts have also noted (either directly or by accepting without comment) that when levying on a debt, the IRS may collect the debt on behalf of the taxpayer from the person owing the taxpayer by notice of levy, without conducting a sale.[5] Thus, because the IRS has no duty to sell levied upon accounts receivable, the taxpayer is not automatically entitled to full credit against his tax deficiency for the face value (or net value) of the

---

[4]Section 6335(f) provides as follows:

> The owner of any property seized by levy may request that the Secretary sell such property within 60 days after such request (or within such longer period as may be specified by the owner). The Secretary shall comply with such request unless the Secretary determines (and notifies the owner within such period) that such compliance would not be in the best interests of the United States.

[5]*See Field v. United States*, 263 F.2d 758, 763 (5th Cir. 1959); *In re Cherry Valley Homes, Inc.*, 255 F.2d 706, 707 (3d Cir. 1958), *cert. denied*, 360 U.S. 918, 79 S.Ct. 1436, 3 L.Ed.2d 1534 (1959); *Shawnee State Bank v. United States*, 735 F.2d 308, 309 (8th Cir. 1984); *Sgro v. United States*, 609 F.2d 1259, 1263 (7th Cir. 1979); *Farmers-Peoples Bank v. United States*, 477 F.2d 752, 754 (6th Cir. 1973).

account seized.

The taxpayers also complain that the IRS, in addition to levying on the accounts, destroyed any residual value of the uncollected accounts by seizing and destroying the corporate records of the accounts and failing to make any collection effort. Without these records, the taxpayers allege that they lost the ability to pursue the remaining uncollected accounts. In addition, when the IRS decided to "write off" the accounts as uncollectible, it did not inform the taxpayer or release the levy so the taxpayer could attempt to salvage any residual value of the accounts. The taxpayers argue that these acts reflect such IRS dominion and control over the asset that the IRS effectively appropriated the entire value of LTS's accounts receivable. As a result, the taxpayers contend that the IRS became

obligated to credit LTS's tax liability for the value of the asset seized at the time of seizure.

The taxpayers rely on two cases to support their position. In *United States v. Pittman*, 449 F.2d 623 (7th Cir. 1971), the IRS served notice of levy on the taxpayer's nominee, who held title to certain rental property belonging to the taxpayer. After the nominee turned the property over to the IRS, the Service managed the property, collected rents and solicited tenants. Notices of levy were served on the tenants, notifying them that they should pay their rent directly to the IRS. During its stewardship, the IRS allowed the property to deteriorate; several houses on the property burned down or were condemned by the local government authorities. The IRS then informed the taxpayer that it regarded him as the equitable owner of the

property. The Seventh Circuit stated:

> Where the Government serves notice of levy . . . and exercises the rights of an owner to control property by insuring it, renting it and compelling payment of rent to itself and no one else, so that the taxpayer justly concludes he has no further right to deal with the property, there has been an effective levy and seizure within the meaning of 26 U.S.C. Sec. 6331 and the taxpayer is entitled to credit for the property seized.

449 F.2d at 627. The court concluded that if taxpayer is not given proper credit for the seizure, the seizure would violate the takings clause of the 5th Amendment to the United States Constitution. *Id.* at 626, citing *Springer v. United States*, 102 U.S. 586, 593-94, 26 L.Ed. 253 (1880). Accordingly, the taxpayer was entitled to a credit for the value of the house when the levy was issued. The case was remanded to determine the value of the property at the time of the levy.

In *In re Barlow's, Inc.*, the IRS

levied on a fully-earned account receivable of Barlow's Inc. for unpaid withholding and FICA taxes. 36 B.R. 826 (B.R. Va. 1984), *aff'd*, 53 B.R. 986 (Va. 1984), *aff'd*, 767 F.2d 1098 (4th Cir. 1985). Without Barlow's participation, the IRS and the account debtor, Western Development Corporation, established a payment schedule for the receivable. After paying only $27,000 of over $102,000 due, Western defaulted on the payment agreement. The Government made no effort to enforce the payment agreement. The district court and the Fourth Circuit, relying heavily on *Pittman*, affirmed the bankruptcy court's holding:

> that the IRS went well beyond a mere service of levy . . . When the IRS levied on the account receivable and subsequently entered into a payment agreement with Western, the law prohibited plaintiff from pursuing Western for the account. IRC Sec. 6332(d) (1976). Additionally, upon Western's failure to surrender the

> property, Western became liable to the United States for the value of the property not surrendered . . . IRC Sec. 6332(d)(1) (Supp. 1982). In addition, there is no indicated that the government advised the plaintiff of the default.
>
> Because of the IRS's exercise of dominion and control over the account receivable in that it failed to proceed with a sale, and failed to proceed to collect the account receivable when Western defaulted, plaintiff should be granted a credit against its tax liability in the amount of the value of the account receivable levied upon by the IRS.

53 B.R. at 989-90.

The taxpayers argue that the facts of this case support a result similar to that approved by the courts in *Barlow* and *Pittman*. We agree with the remedy allowed the taxpayers in *Pittman* and *Barlow*. However, because the facts in today's case are materially different from those cases, we reach a different result.

[5] The facts of this case are distinguishable from those in *Barlow*. In

this case, the IRS did not alter the terms of the account debtor's liability by negotiating new payment terms with the various account debtors. We decline to hold as a matter of law that every time the IRS levies upon and seizes records of accounts receivable it has dominion and control over the asset that entitles the taxpayer to a credit for the value of the receivables at the time of the levy. The fact of the levy does not shift the collection risk to the government.

[6] Neither is the IRS required to expend any particular level of effort to collect the levied upon accounts when it has not negotiated new terms with the account debtor. No statute or case law imposes such a requirement. The IRS may generate more revenue at a lower cost by simply collecting the easy paying accounts without expending the time and money to pursue the taxpayers' unwilling

debtors. In the ordinary case, the IRS need only ensure that the taxpayer is credited with the amount actually collected on the accounts.

[7] In addition, although the taxpayers in this case are basically dissatisfied with the IRS collection efforts and the amount the IRS collected, their proffered evidence does not show that more vigorous efforts would have yielded additional collections. On this basis *Pittman* can also be distinguished. Although the taxpayers complain that the IRS physically destroyed the corporate records of the accounts, that act is not analogous to allowing real estate to physically deteriorate. There is no showing that the destruction of the records affected the value of the accounts. Block knew the identity of some of the accounts. After the levy, he contacted some of his account debtors to

urge them to pay. These efforts met with little or no success and the record does not demonstrate that further collection efforts by Block would have yielded any greater success. The proffered evidence does not substantiate taxpayers' theory that their lack of records and the IRS's lack of collection effort destroyed the value of the accounts receivable.

[8] The taxpayers also complain that the IRS did not release the levy or inform them when they abandoned collection of certain of the accounts. We see no reason to require the IRS to release the levy as long as the taxes remain unpaid. If the account debtors decide to pay the account, the IRS is entitled to those funds. In addition, the taxpayers offer of proof indicates that the IRS case agent had numerous discussions with Block about the progress of the collections on the accounts.

There is no indication that the taxpayers requested and were denied any information about the IRS handling of the levy. Finally, as the IRS points out, if the taxpayers were dissatisfied with the level of collection effort by the IRS and felt that the value of the asset was greater than the value being received by the IRS in the liquidation process, they were free to redeem the accounts receivable by paying the tax deficiency. *See* Sec. 6337(a).

For the foregoing reasons, we affirm the judgment of the district court.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

ROBERT L. CASH and EVELYN L. CASH,	)(	
Plaintiffs,	)(	
v.	)(	
UNITED STATES OF AMERICA,	)(	
Defendant,	)(	
RANDALL C. BLOCK,	)(	
Additional Defendant on Counterclaim	)(	Civil Action No. CA-5-89-149-C

ORDER

Came on to be considered the Plaintiff's Motion for Judgment Notwithstanding Jury Verdict. The Court having considered said motion together with supporting brief, along with the post-trial memorandum filed by the United States of America, is of the opinion that said motion should be DENIED.

The Court concludes as a matter of law that the Internal revenue Service has

already collected all of the available corporate accounts receivable and has properly applied all credits to the corporate From 941 liability of LTS Optical, Inc.

From the total assessments of $83,909.31, credit shall be given to the plaintiffs in the amount of $5,777.00, which amount was withheld from the plaintiffs' 1986 income tax refund by the Internal Revenue Service.

Judgment shall be entered in accordance with the jury's verdict and in accordance with the ruling of the Court as stated hereinabove.

SO ORDERED.

Dated September 17, 1990.

/SIGNED/
SAM R. CUMMINGS
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

ROBERT L. CASH and EVELYN L. CASH,	)(	
Plaintiffs,	)(	
v.	)(	
UNITED STATES OF AMERICA,	)(	
Defendant,	)(	
RANDALL C. BLOCK,	)(	
Additional Defendant on Counterclaim	)(	Civil Action No. CA-5-89-149-C

JUDGMENT

This matter having come on for trial on September 5, 1990, before the Court and a jury; the issues having been duly tried and the jury having returned a verdict on September 6, 1990, in favor of defendant, United States of America, against plaintiff Robert L. Cash for all quarters, against plaintiff Evelyn L. Cash for the first and second quarters of 1986, and against defendant on

counterclaim, Randall C. Block, for all quarters; it is therefore

ORDERED, ADJUDGE AND DECREED that

1. Plaintiff Robert L. Cash, is indebted to defendant, United States of America, in the sum of $83,909.31, plus interest thereon at the rate established under 26 U.S.C., Section 6621, from August 17, 1987, less the $5,223.82 previously paid by plaintiff, Robert L. Cash, which represents Robert L. Cash's liability under 26 U.S.C., Section 6672, with respect to the unpaid employment taxes of LTS Optical, Inc. for the fourth quarter of 1984, first and fourth quarters of 1985, and first and second quarters of 1986.

2. Plaintiff, Evelyn L. Cash, is indebted to defendant, United States of America, in the sum of $39,889.28, plus interest thereon at the rate established under 26 U.S.C., Section 6621, from

August 17, 1987, less the $1,061.48 previously paid by plaintiff, Evelyn L. Cash, which represents Evelyn L. Cash's liability under 26 U.S.C., Section 6672, with respect to the unpaid employment taxes of LTS Optical, Inc. for the first and second quarters of 1986.

3. Defendant on counterclaim, Randall C. Block, is indebted to the defendant, United States of America, in the sum of $83,909.31, plus interest thereon at the rate established under 26 U.S.C., Section 6621, from August 17, 1987, less the $3,676.00 previously paid by defendant on counterclaim, Randall C. Block, which represents Randall C. Block's liability under 26 U.S.C., Section 6672, with respect to the unpaid employment taxes of LTS Optical, Inc. for the fourth quarter of 1984, first and fourth quarters of 1985, and first and second quarters of 1986.

4. All relief sued for by any party not specifically granted herein is denied.

5. Costs of the Court of Defendant, v),d States of America, are taxed against Plaintiff Robert L. Cash, Plaintiff Evelyn L. Cash and Defendant on Counterclaim Randall C. Block, as a joint and several liability.

SIGNED this 26th day of September, 1990.

/SIGNED/
SAM R. CUMMINGS
UNITED STATES DISTRICT JUDGE

Presented by:

/SIGNED/
JON E. FISHER
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ATTORNEY FOR UNITED STATES

IRC Sec. 6631. Levy and distraint.

(a) Authority of Secretary

If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary to collect such tax (and such further sum as shall be sufficient to cover the expenses of the levy) by levy upon all property and rights to property (except such property as is exempt under section 6334) belonging to such person or on which there is a lien provided in this chapter for the payment of such tax. Levy may be made upon the accrued salary or wages of any officer, employee, or elected official, of the United States, the District of Columbia, or any agency or instrumentality of the United States or the District of Columbia, by serving a notice of levy on the employer (as defined in section 3401(d)) of such

officer, employee, or elected official. If the Secretary makes a finding that the collection of such tax is in jeopardy, notice and demand for immediate payment of such tax may be made by the Secretary and, upon failure or refusal to pay such tax, collection thereof by levy shall be lawful without regard to the 10-day period provided in this section.

(b) Seizure and sale of property.

The term "levy" as used in this title includes the power of distraint and seizure by any means. Except as otherwise provided in subsection (e), a levy shall extend only to property possessed and obligations existing at the time thereof. In any case in which the Secretary may levy upon property or rights to property, he may seize and sell such property or rights to property (whether real or personal, tangible or intangible).

(c) Successive seizures.

Whenever any property or right to property upon which levy has been made by virtue of subsection (a) is not sufficient to satisfy the claim of the United States for which levy is made, the Secretary may, thereafter, and as often as may be necessary, proceed to levy in like manner upon any other property liable to levy of the person against whom such claim exists, until the amount due from him, together with all expenses, is fully paid.

(d) Requirement of notice before levy.

(1) In general. Levy may be made under subsection (a) upon the salary or wages or other property of any person with respect to any unpaid tax only after the Secretary has notified such person in writing of his intention to make such levy.

(2) 30-day requirement. The notice

required under paragraph (1) shall be--

(A) given in person,

(B) left at the dwelling or usual place of business of such person, or

(C) sent by certified or registered mail to such person's last known address,

no less than 30 days before the day of the levy.

(3) Jeopardy. Paragraph (1) shall not apply to a levy if the Secretary has made a finding under the last sentence of subsection (a) that the collection of tax is in jeopardy.

(4) Information included with notice. The notice required under paragraph (1) shall include a brief statement which sets forth in simple and nontechnical terms--

(A) the provisions of this

title relating to levy and sale of property,

(B) the procedures applicable to the levy and sale of property under this title,

(C) the administrative appeals available to the taxpayer with respect to such levy and sale and the procedures relating to such appeals,

(D) the alternatives available to taxpayers which could prevent levy on the property (including installment agreements under section 6159),

(E) the provisions of this title relating to redemption of property and release of liens on property, and

(F) the procedures applicable to the redemption of property and the release of a lien on

property under this title.

(e) Continuing levy on salary and wages.

The effect of a levy on salary or wages payable to or received by a taxpayer shall be continuous from the date such levy is first made until such levy is released under section 6343.

(f) Uneconomical levy.

No levy may be made on any property if the amount of the expenses which the Secretary estimates (at the time of levy) would be incurred by the Secretary with respect to the levy and sale of such property exceeds the fair market value of such property at the time of levy.

(g) Levy on appearance date of summons.

(1) In general. No levy may be made on the property of any person on any day on which such person (or officer or employee of such person) is required to appear in response to a summons issued by the Secretary

for the purpose of collecting any underpayment of tax.

(2) No application in case of jeopardy. This subsection shall not apply if the Secretary finds that the collection of tax is in jeopardy.

(h) Cross references.

(1) For provisions relating to jeopardy, see subchapter A of chapter 70.

(2) For proceedings applicable to sale of seized property, see section 6335.

(3) For release and notice of release of levy, see section 6343.

IRC Sec. 6332. Surrender of property subject to levy.

(a) Requirement.

Except as otherwise provided in subsections (b) and (c), any person in

possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made shall, upon demand of the Secretary, surrender such property or rights (or discharge such obligation) to the Secretary, except such part of the property or rights as is, at the time of such demand, subject to an attachment or execution under any judicial process.

(b) Special rule for life insurance and endowment contracts.

(1) In general. A levy on an organization with respect to a life insurance or endowment contract issued by such organization shall, without necessity for the surrender of the contract document, constitute a demand by the Secretary for payment of the amount described in paragraph (2) and the exercise of the right of the person against whom

the tax is assessed to the advance of such amount. Such organization shall pay over such amount 90 days after service of notice of levy. Such notice shall include a certification by the Secretary that a copy of such notice has been mailed to the person against whom the tax is assessed at his last known address.

(2) Satisfaction of levy. Such levy shall be deemed to be satisfied if such organization pays over to the Secretary the amount which the person against whom the tax is assessed could have had advanced to him by such organization on the date prescribed in paragraph (1) for the satisfaction of such levy, increased by the amount of any advance (including contractual interest thereon) made to such person on or

after the date such organization had actual notice or knowledge (within the meaning of section 6323(i)(1)) of the existence of the lien with respect to which such levy is made, other than an advance (including contractual interest thereon) made automatically to maintain such contract in force under an agreement entered into before such organization had such notice or knowledge.

(3) Enforcement proceedings. The satisfaction of a levy under paragraph (2) shall be without prejudice to any civil action for the enforcement of any lien imposed by this title with respect to such contract.

(c) Special rule for banks.

Any bank (as defined in section 408(n)) shall surrender (subject to an

attachment or execution under judicial process) any deposits (including interest thereon) in such bank only after 21 days after service of levy.

(d) Enforcement of levy.

(1) Extent of personal liability. Any person who fails or refuses to surrender any property or rights to property, subject to levy, upon demand by the Secretary, shall be liable in his own person and estate to the United States in a sum equal to the value of the property or rights not so surrendered, but not exceeding the amount of taxes for the collection of which such levy has been made, together with costs and interest on such sum at the underpayment rate established under section 6621 from the date of such levy (or, in the case of a levy described in section 6331(d)(3),

from the date such person would otherwise have been obligated to pay over such amounts to the taxpayer). Any amount (other than costs) recovered under this paragraph shall be credited against the tax liability for the collection of which such levy was made.

(2) Penalty for violation. In addition to the personal liability imposed by paragraph (1), if any person required to surrender property or rights to property fails or refuses to surrender such property or rights to property without reasonable cause, such person shall be liable for a penalty equal to 50 percent of the amount recoverable under paragraph (1). No part of such penalty shall be credited against the tax liability for the collection of which such

levy was made.

(e) Effect of honoring levy.

Any person in possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made who, upon demand by the Secretary, surrenders such property or rights to property (or discharges such obligation) to the Secretary (or who pays a liability under subsection (d)(1)) shall be discharged from any obligation or liability to the delinquent taxpayer and any other person with respect to such property or rights to property arising from such surrender or payment.

(f) Person defined.

The term "person," as used in subsection (a), includes an officer or employee of a corporation or a member or employee of a partnership, who as such officer, employee, or member is under a

duty to surrender the property or rights to property, or to discharge the obligation.

IRC Sec. 6335. Sale of seized property.

(a) Notice of seizure.

As soon as practicable after seizure of property, notice in writing shall be given by the Secretary to the owner of the property (or, in the case of personal property, the possessor thereof), or shall be left at his usual place of abode or business if he has such within the internal revenue district where the seizure is made. If the owner cannot be readily located, or has no dwelling or place of business within such district, the notice may be mailed to his last known address. Such notice shall specify the sum demanded and shall contain, in the case of personal property, an account of the property seized and, in the case

of real property, a description with reasonable certainty of the property seized.

(b) Notice of sale.

The Secretary shall as soon as practicable after the seizure of the property give notice to the owner, in the manner prescribed in subsection (a), and shall cause a notification to be published in some newspaper published or generally circulated within the county wherein such seizure is made, or, if there be no newspaper published or generally circulated in such county, shall post such notice at the post office nearest the place where the seizure is made, and in not less than two other public places. Such notice shall specify the property to be sold, and the time, place, manner, and conditions of the sale thereof. Whenever levy is made without regard to the 10-day period provided in

section 6331(a), public notice of sale of the property seized shall not be made within such 10-day period unless section 6336 (relating to sale of perishable goods) is applicable.

(c) Sale of indivisible property.

If any property liable to levy is not divisible, so as to enable the Secretary by sale of a part thereof to raise the whole amount of the tax and expenses, the whole of such property shall be sold.

(d) Time and place of sale.

The time of sale shall not be less than 10 days nor more than 40 days from the time of giving public notice under subsection (b). The place of sale shall be within the county in which the property is seized, except by special order of the Secretary.

(e) Manner and conditions of sale.

(1) In general.

(A) Determinations relating to minimum price. Before the sale of property seized by levy, the Secretary shall determine--

(i) a minimum price for which such property shall be sold (taking into account the expense of making the levy and conducting the sale), and

(ii) whether, on the basis of criteria prescribed by the Secretary, the purchase of such property by the United States at such minimum price would be in the best interest of the United States.

(B) Sale to highest bidder at or above minimum price. If, at the sale, one or more persons

offer to purchase such property for not less than the amount of the minimum price, the property shall be declared sold to the highest bidder.

(C) Property deemed sold to United States at minimum price in certain cases. If no person offers the amount of the minimum price for such property at the sale and the Secretary has determined that the purchase of such property by the United States would be in the best interest of the United States, the property shall be declared to be sold to the United States at such minimum price.

(D) Release to owner in other cases. If, at the sale, the property is not declared sold

under subparagraph (B) or (C), the property shall be released to the owner thereof and the expense of the levy and sale shall be added to the amount of tax for the collection of which the levy was made. Any property released under this subparagraph shall remain subject to any lien imposed by subchapter C.

(2) Additional rules applicable to sale. The Secretary shall by regulations prescribe the manner and other conditions of the sale of property seized by levy. If one or more alternative methods or conditions are permitted by regulations, the Secretary shall select the alternatives applicable to the sale. Such regulations shall provide:

(A) That the sale shall not be conducted in any manner other than--

(i) by public auction, or

(ii) by public sale under sealed bids.

(B) In the case of the seizure of several items of property, whether such items shall be offered separately, in groups, or in the aggregate; and whether such property shall be offered both separately (or in groups) and in the aggregate, and sold under whichever method produces the highest aggregate amount.

(C) Whether the announcement of the minimum price determined by the Secretary may be delayed until the receipt of the highest bid.

(D) Whether payment in full shall be required at the time of acceptance of a bid, or whether a part of such payment may be deferred for such period (not to exceed 1 month) as may be determined by the Secretary to be appropriate.

(E) The extent to which methods (including advertising) in addition to those prescribed in subsection (b) may be used in giving notice of the sale.

(F) Under what circumstances the Secretary may adjourn the sale from time to time (but such adjournments shall not be for a period to exceed in all 1 month).

(3) Payment of amount bid. If payment in full is required at the time of acceptance of a bid and is

not then and there paid, the Secretary shall forthwith proceed to again sell the property in the manner provided in this subsection. If the conditions of the sale permit part of the payment to be deferred, and if such part is not paid within the prescribed period, suit may be instituted against the purchaser for the purchase price or such part thereof as has not been paid, together with interest at the rate of 6 percent per annum from the date of the sale; or, in the discretion of the Secretary, the sale may be declared by the Secretary to be null and void for failure to make full payment of the purchase price and the property may again be advertised and sold as provided in subsections (b) and (c) and this subsection. In the event of such readvertisement

and sale any new purchaser shall receive such property or rights to property, free and clear of any claim or right of the former defaulting purchaser, of any nature whatsoever, and the amount paid upon the bid price by such defaulting purchaser shall be forfeited.

(f) Right to request sale of seized property within 60 days.

The owner of any property seized by levy may request that the Secretary sell such property within 60 days after such request (or within such longer period as may be specified by the owner). The Secretary shall comply with such request unless the Secretary determines (and notifies the owner within such period) that such compliance would not be in the best interests of the United States.

(g) Stay of sale of seized property pending Tax Court decision.

For restrictions on sale of seized property pending Tax Court decision, see section 6863(b)(3).

IRC Sec. 6337. Redemption of property.

(a) Before sale.

Any person whose property has been levied upon shall have the right to pay the amount due, together with the expenses of the proceeding, if any, to the Secretary at any time prior to the sale thereof, and upon such payment the Secretary shall restore such property to him, and all further proceedings in connection with the levy on such property shall cease from the time of such payment.

(b) Redemption of real estate after sale.

(1) Period. The owners of any real property sold as provided in section 6335, their heirs, executors, or

administrators, or any person having any interest therein, or a lien thereon, or any person in their behalf, shall be permitted to redeem the property sold, or any particular tract of such property, at any time within 180 days after the sale thereof.

(2) Price. Such property or tract of property shall be permitted to be redeemed upon payment to the purchaser, or in case he cannot be found in the county in which the property to be redeemed is situated, then to the Secretary, for the use of the purchaser, his heirs, or assigns, the amount paid by such purchaser and interest thereon at the rate of 20 percent per annum.

(c) Record.

When any lands sold are redeemed as provided in this section, the Secretary

shall cause entry of the fact to be made upon the record mentioned in section 6340, and such entry shall be evidence of such redemption.

IRC Sec. 6342. Application of proceeds of levy.

(a) Collection of liability.

Any money realized by proceedings under this subchapter (whether by seizure, by surrender under section 6332 (except pursuant to subsection (c)(2) thereof), or by sale of seized property) or by sale of property redeemed by the United States (if the interest of the United States in such property was a lien arising under the provisions of this title) shall be applied as follows:

(1) Expense of levy and sale. First, against the expenses of the proceedings;

(2) Specific tax liability on

seized property. If the property seized and sold is subject to a tax imposed by any internal revenue law which has not been paid, the amount remaining after applying paragraph (1) shall then be applied against such tax liability (and, if such tax was not previously assessed, it shall then be assessed);

(3) Liability of delinquent taxpayer. The amount, if any, remaining after applying paragraphs (1) and (2) shall then be applied against the liability in respect of which the levy was made or the sale was conducted.

(b) Surplus proceeds.

Any surplus proceeds remaining after the application of subsection (a) shall, upon application and satisfactory proof in support thereof, be credited or refunded by the Secretary to the person

or persons legally entitled thereto.

IRC Sec. 6672

(a) General rule.

Any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over. No penalty shall be imposed under section 6653 or part II of subchapter A of chapter 68 for any offense to which this section is applicable.

(b) Extension of period of collection where bond is filed.

(1) In general. If, within 30 days after the day on which notice and demand of any penalty under subsection (a) is made against any person, such person--

(A) pays an amount which is not less than the minimum amount required to commence a proceeding in court with respect to his liability for such penalty.

(B) files a claim for refund of the amount so paid, and

(C) furnishes a bond which meets the requirements of paragraph (3),

no levy or proceeding in court for the collection of the remainder of such penalty shall be made, begun, or prosecuted until a final resolution of a proceeding begun as provided in paragraph (2).

Notwithstanding the provisions of section 7421(a), the beginning of such proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court. Nothing in this paragraph shall be construed to prohibit any counterclaim for the remainder of such penalty in a proceeding begun as provided in paragraph (2).

(2) Suit must be brought to determine liability for penalty. If, within 30 days after the day on which his claim for refund with respect to any penalty under subsection (a) is denied, the person described in paragraph (1) fails to begin a proceeding in the appropriate United States district court (or in the Court of Claims) for the determination of his

liability for such penalty, paragraph (1) shall cease to apply with respect to such penalty, effective on the day following the close of the 30-day period referred to in this paragraph.

(3) Bond. The bond referred to in paragraph (1) shall be in such form and with such sureties as the Secretary may by regulations prescribe and shall be in an amount equal to 1½ times the amount of excess of the penalty assessed over the payment described in paragraph (1).

(4) Suspension of running of period of limitations on collection. The running of the period of limitations provided in section 6502 on the collection by levy or by a proceeding in court in respect of any penalty described in paragraph

(1) shall be suspended for the period during which the Secretary is prohibited from collecting by levy or a proceeding in court.

(5) Jeopardy collection. If the Secretary makes a finding that the collection of the penalty is in jeopardy, nothing in this subsection shall prevent the immediate collection of such penalty.

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(2)

No. 92-384

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In the Supreme Court of the United States

OCTOBER TERM, 1992

ROBERT L. CASH, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a corporation's withholding tax liability is satisfied when (i) the Internal Revenue Service levies on corporate accounts receivable that have a face value greater than or equal to the unpaid withholding taxes, (ii) the Service does not immediately sell the receivables and (iii) the Service ultimately collects from the receivables an amount less than the unpaid withholding taxes.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A2-A34) is reported at 961 F.2d 562. The order entered by the district court (Pet. App. A35-A36) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 1, 1992. The petition for a writ of certiorari was filed on August 28, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. LTS Optical, Inc. (LTS) withheld social security and income taxes from the wages of its employees in the amount of $243,263.50 for the fourth quarter of 1984, the first and fourth quarters of 1985, and the first and second quarters of 1986. LTS paid over to the United States, however, only a small portion of the amount withheld (Pet. App. A9). In an effort to collect the unpaid withholding taxes ($150,005.95), the Internal Revenue Service levied upon certain accounts receivable of LTS. These accounts receivable were in the face amount of $200,000. As checks from the account debtors were received, the Service applied the payments toward satisfaction of LTS's tax liability. Pet. App. A10.

After all credits were given, $84,000 of LTS's withholding taxes remained unpaid. The Service then assessed petitioners as "responsible persons" for the unpaid balance under 26 U.S.C. 6672.[1] The Service credited income tax refunds due petitioners Robert and Evelyn Cash from later years against their respective Section 6672 liabilities. Pet. App. A10. The Cashes brought this suit for refund in district court. The United States counterclaimed for the remaining taxes due and joined petitioner Randall Block in the action. Petitioners contended (i) that they were not responsible persons who

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[1] When net wages are paid to employees, the withheld taxes are credited to the employees even if the employer thereafter fails to remit the withheld taxes to the United States. To prevent a loss of revenue, Section 6672 of the Code provides that "[a]ny person required to collect, truthfully account for, and pay over any tax" who willfully fails to do so shall be liable for a penalty equal to the total amount of the tax not paid over. 26 U.S.C. 6672. See *United States* v. *Sotelo*, 436 U.S. 268 (1978).

willfully failed to pay over the withheld taxes and (ii) that they were entitled to a credit against their liability in an amount equal to the face amount of the LTS accounts receivable on the date of the Service's levy. Pet. App. A10-A11.

2. The jury found that petitioners were responsible for LTS's failure to pay the withholding taxes of LTS's employees.[2] The district court rejected petitioners' claim that, since the face amount of the accounts receivable the government obtained by levy exceeded LTS's withholding tax liability, the corporation's liability (and consequently petitioners' liability as responsible persons) should be deemed paid in full. Pet. App. A13-A14. The district court denied that motion, holding that "the Internal [R]evenue Service has already collected all of the available corporate accounts receivable and has properly applied all credits to the corporate * * * liability of LTS Optical, Inc." (Pet. App. A35-A36).

3. Petitioners' sole contention on appeal was that the withholding taxes should have been deemed paid upon the levy by the Internal Revenue Service of the accounts receivable of LTS. They therefore claimed that they were not liable for any penalties under Section 6672. Relying on *United States* v. *Barlow's, Inc.* (*In re Barlow's Inc.*), 767 F.2d 1098 (4th Cir. 1985), aff'g 53 Bankr. 986 (E. D. Va. 1984), aff'g 36 Bankr. 826 (Bankr. E. D. Va. 1984), and *United States* v. *Pittman*, 449 F.2d 623 (7th Cir. 1971), petitioners contended that the Internal Revenue Service was required promptly to sell the accounts receivable pursuant to Section 6335(b) of the Internal Revenue Code. Because the Service did not sell the accounts

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[2] The jury ruled in favor of Evelyn Cash, however, for the first three of the five quarters at issue. Pet. App. A13.

receivable, petitioners claimed that they are entitled to a credit equal to the face amount of the accounts receivable on the date of the levy. Petitioners further claimed that the Service's failure to credit the face amount of the accounts against LTS's tax liability violated the Takings Clause of the Fifth Amendment to the United States Constitution. Pet. App. A21-A22.

The court of appeals affirmed the district court's decision. The court held that Section 6335(b) does not require the Internal Revenue Service to sell all the property it obtains by levy, but simply sets forth the procedures the Service must follow when it *does* sell such property (Pet. App. A23). The court explained that the statutory provisions regarding liens and levies "indicate that the Secretary has discretion over the decision to sell" (*ibid.*). "[B]ecause the IRS has no duty to sell levied upon accounts receivable, the taxpayer is not automatically entitled to full credit against his tax deficiency for the face value (or net value) of the account seized." *Id.* at A25-A26.

The court of appeals also rejected petitioners' contention that, by failing affirmatively to take action to sell the accounts receivable, the government took their property without compensation in violation of the Fifth Amendment. The court "decline[d] to hold as a matter of law that every time the IRS levies upon and seizes records of accounts receivable it has dominion and control over the asset that entitles the taxpayer to a credit for the value of the receivables at the time of the levy. The fact of the levy does not shift the collection risk to the government." Pet. App. A31. The court distinguished *United States* v. *Pittman*, 449 F.2d at 625, where the government levied upon rental real property, rented the property and allowed it to deteriorate. The court ob-

served that, unlike the situation found in *Pittman*, there was no evidence in this case to indicate that the Internal Revenue Service's action (or inaction) affected the value of the accounts receivable (Pet. App. A32-A33).

ARGUMENT

The court of appeals correctly held that LTS's accrued withholding tax liability was not satisfied by the Service's levy on the corporation's accounts receivable. The decision of the court of appeals does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore not warranted.

1. The court of appeals correctly rejected petitioners' argument that, under Section 6335(b) of the Code, the government must promptly sell the levied upon accounts receivable, or assume all risks of collection. Section 6335(b) does not require the Internal Revenue Service to sell all property obtained by levy. Instead, as the court of appeals correctly held (Pet. App. A23), the statute simply sets forth procedural requirements governing notice of a sale to the owner of the property and to the public when a sale *is* to be held. See 26 U.S.C. 6335(b).

Section 6331(b) of the Code states only that the Secretary "may" sell property that has been seized upon levy. 26 U.S.C. 6331(b). The use of the word "may" in the statute plainly confers discretion on the Secretary. See *United States* v. *Rodgers*, 461 U.S. 677 (1983).[3] Even

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[3] Courts consistently have held that, when (as in this case) the Service levies on a debt, the Service may collect the debt directly from the party upon whom the notice of levy was served rather than conducting a sale. *United States* v. *Rochelle*, 363 F.2d 225, 228 (5th Cir. 1966); *United States* v. *Sullivan*, 333 F.2d 100, 120 n.39 (3d Cir. 1964); *Field* v. *United States*, 263 F.2d 758, 763 (5th Cir.), cert. denied, 360 U.S. 918 (1959); *In re Cherry Valley Homes*,

when the owner of the seized property requests that it be sold, Section 6335(f) specifically grants the Secretary discretion to decline to do so if the sale "would not be in the best interests of the United States" (26 U.S.C. 6335(f)).

Economic realities support Congress's conclusion that a sale should not be required after every levy. When the government levies upon a debt—such as a bank account or an account receivable—it is often counter-productive to conduct a sale of the account. The purchaser of the account necessarily would discount its face value in order to realize a profit and to take into account the risks of collection. The expenses of holding the sale would further reduce the net amount realized. The value realized by sale of the taxpayer's accounts may thereby be significantly reduced. Congress thus left it to the discretion of the Service in each individual case whether to sell or attempt direct collection of the accounts levied. See note 3, *supra*.

2. Contrary to petitioners' contention (Pet. 7-16), the decision in this case does not conflict with *In re Barlow's, Inc.* and *United States* v. *Pittman*.

a. In *In re Barlow's, Inc.*, the government levied upon the taxpayer's account receivable and entered into an agreement with the account debtor that required installment payments of the debt. After making a few of the payments, the account debtor defaulted. The government did not then institute suit to enforce the agreement. The taxpayer contended that, in these circumstances, its tax liability should be reduced by the full

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Inc., 255 F.2d 706, 707 (3d Cir.), cert. denied, 358 U.S. 864 (1958). Cf. *United States* v. *National Bank of Commerce*, 472 U.S. 713 (1985).

face value of the accounts receivable and not the amount actually collected.

The district court agreed with the taxpayer. The court found it crucial that the IRS went "far beyond a mere levy on the property," and that, after entering into a payment agreement with the account debtor, the Service did not upon default seek to enforce that agreement. 53 Bankr. at 989. The court of appeals affirmed "based on these unique facts." 767 F.2d at 1100.

The "unique" facts presented in *In re Barlow's, Inc.*, are not present here. As the court of appeals observed (Pet. App. A31), there was no payment agreement in this case and the Service did not in any manner contribute to the failure of the corporation's account debtors to pay over the amounts owing to the corporation.

b. The decision in *United States* v. *Pittman*, is also inapposite. In *Pittman*, the Service levied upon certain rental property and obtained a quit-claim deed. The Service then insured the property and solicited tenants. Notices of levy were served on the tenants, notifying them that they should pay their rent to the government. Following the levy, the property deteriorated, and the government sought to collect the remaining tax deficiency from the taxpayer. The court of appeals held that, when the government "compels transfer of legal title to itself and exercises the rights of an owner to control property by insuring it, renting it and compelling payment of rent to itself," and the property thereafter deteriorates, the taxpayer is entitled to credit for the full fair market value of the property as of the date of the levy. 449 F.2d at 627. The court further observed in *Pittman*, however, that the government has no duty to sell accounts receivable obtained by levy, and may instead require the account debtor to make payment "directly to the Govern-

ment." *Ibid.* The decision in *Pittman* thus plainly does not conflict with the decision in this case.

3. Petitioners contend (Pet. 17-23) that the Service's actions in this case effected a taking of their property without just compensation. A seizure of property toward satisfaction of outstanding tax liabilities is not a seizure without just compensation. No court has accepted petitioners' contrary contention.

The vast majority of taxpayers, of course, voluntarily pay their taxes and do not impose on the government the burden of selecting and liquidating particular assets for this purpose. Prior to the levies issued in this case, petitioners could have collected or sold the accounts receivable and—according to their version of the value of those accounts—thereby paid the corporation's tax liability. As the court of appeals noted (Pet. App. A34), petitioners were also free to redeem the accounts receivable after the levy under Section 6337 of the Code (26 U.S.C. 6337). Petitioners' failure or refusal to pay withholding taxes over to the government should not be a basis for shifting the risk of collection of the corporate accounts receivable onto the public fisc.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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